In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 443

BENJAMIN A. SCHABERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

The opinion of the court of appeals (Pet. App. 3a-12a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1966. A petition for a rehearing was denied on July 20, 1964. The petition for a writ of certiorari was filed on August 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances, the trial court erred in admitting a business record into evidence.

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2. Whether there was error in the instructions to the jury.

STATUTE INVOLVED

28 U.S.C. 1732(a) provides as follows:

> In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

STATEMENT

Petitioner was indicted in the United States District Court for the Eastern District of New York in three counts,[1] which charged that he, as a labor union officer, received various sums of money from an em-

[1] Count 1 charged the receipt of approximately $1,150 on or about April 19, 1960; count 2, the receipt of approximately $250 on or about July 19, 1960; and count 3, the receipt of approximately $300 on or about January 28, 1961.

ployer, in violation of Section 302(b)(1) and (d) of the Labor Management Relations Act, 29 U.S.C. 186 (b)(1) and (d). (R. 4a–5a.)[2] After a jury trial, he was convicted on all three counts (R. 127a) and sentenced to imprisonment for three months and fined $5,000 on count 1. Sentence was suspended on counts 2 and 3 and petitioner was placed on probation for a period of two years (R. 134a–135a). The court of appeals affirmed the conviction.

At all relevant times, petitioner was the business agent for a plumbers' local whose members were employed in the construction of an apartment house complex on Staten Island, New York, known as "Stapleton Houses." Leon Novak, president of "Novak and Company," which was building the apartments, met with petitioner in the spring of 1959, shortly after the work had begun. Petitioner told Novak that he would get the best men available and that they would do a good job, in exchange for which Novak promised to pay petitioner a sum amounting to five dollars for each of the 690 units in the complex (R. 8a–11a). Novak testified that he made various cash payments to petitioner totaling the $1,150 alleged in count 1, although he could not recall the specific amount of each payment (R. 15a–16a). He further testified to particular payments of $250 on July 19, 1960, and $300 on January 28, 1961. The construction did not proceed as anticipated, and Novak gave petitioner only $1,700 (R. 15a–16a) of

[2] The figures in parentheses refer to the pages of petitioner's printed Appendix in the court of appeals.

the approximately $3,400 that would have been due him under the illicit agreement (R. 19a–20a).

Novak's bookkeeper testified that when she made a withdrawal from a secret cash fund and gave the money to Novak in an envelope, she would make an entry in a special book (Gov't Ex. 10, R. 132a–133a), which was admitted without objection (R. 47a). If Novak mentioned a name, it would be reflected in the entry. Petitioner's name appeared with respect to entries on July 19, 1960 and January 28, 1961 (R. 45a–51a). The book did not reflect the previous payments amounting to $1,150 as charged in count 1 of the indictment and as testified to by Novak.

A page of another, smaller book kept by the bookkeeper as a record of job expense payments was admitted into evidence (R. 52a–54a), over objection.[3] This page contained the heading: "Staple.—693 apts @ 5=3465—B. Schabert" and entries, "4/19/60, 1150; 7/19/60, 250; 1/28/61, 300" (Gov't Ex. 1, R. 130a). Novak testified that, when he made a payment to petitioner, he would get the money from his bookkeeper and keep a record on slips of paper. He said the slips were compiled at one time as a total result by the bookkeeper, (he thought some time in the latter part of 1960), put into the book, and the slips destroyed (R. 17a–19a). The bookkeeper testified with regard to the small book that she would make entries when she received instructions from Novak to do something and that she would make such

[3] The basis for the objection was that the small book "was not a book kept in the regular course of business" (R. 55a and 55a), that it had "nothing to do with business" (R. 35a).

entries either at the time Novak gave her such instructions or a day or two later, but within a day or two of the date that appeared thereon (R. 31a, 33a, 52a). Neither the government nor the defense asked the bookkeeper whether or not she had compiled slips totalling $1,150 as shown by the entry for April.

ARGUMENT

1. There was no error in the admission of government's Exhibit 1. The only objection to this exhibit at trial was that it was not kept in the regular course of business, that it had nothing to do with the business (*supra,* note 3), apparently referring to the illegality of the payments recorded (R. 35a–39a). This objection was wholly without merit, as the legitimacy of the transactions shown has nothing to do with the regularity of their entry in the course of business. *United States* v. *Re,* 336 F. 2d 306 (C.A. 2), certiorari denied, 379 U.S. 904; *United States* v. *Quick,* 128 F. 2d 832, 837 (C.A. 3).

In the court of appeals, and in this Court, petitioner has argued that Exhibit 1 should not have been admitted under 28 U.S.C. 1732(a) because the entries were not contemporaneously made. Novak testified that he believed the slips (relating to the payments) had been presented to his bookkeeper in the latter part of 1960, whereas the bookkeeper testified that the entries were made within a day or two of the date shown. In any event, as the court below held, inasmuch as proof of the fact that payments amounting to $1,150 were made depended entirely on the testimony of Novak, little if any weight was gained by the

entry's being admitted in evidence.[4] The exact amount of the payments made was immaterial. And, since the payments in July 1960 and January 1961 were reflected in the other book (admitted without objection) Exhibit 1 was superfluous as to them. The court of appeals correctly ruled that, in view of the purely cumulative nature of this evidence, it was unnecessary to determine its strict admissibility under the Business Records Act. *Doss* v. *United States*, 355 F. 2d 663, 666 (C.A. 8); *United States* v. *Quong*, 303 F. 2d 499, 504 (C.A. 6), certiorari denied, 371 U.S. 863; cf. *Gajewski* v. *United States*, 321 F. 2d 261, 267 (C.A. 8), certiorari denied, 375 U.S. 968.[5]

2. None of the various issues raised concerning the charge to the jury warrant further review in this Court.

a. The court prefaced an unexceptionable instruction that no inference of guilt was to be drawn from petitioner's failure to testify with the following remark:

> I normally do not include this in the charge. I do so only because I have been requested to do so. [R. 119a.]

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[4] The entry was not independent corroboration of Novak's testimony; it, too, depended on his credibility since the bookkeeper made entries as ordered by Novak, and had no personal knowledge of payments to petitioner.

[5] Quite apart from the Act, the disputed page would have been usable at trial under common law principles to refresh Novak's recollection (see R. 12a), since both Novak, who made the payments and prepared the information to be recorded, and the bookkeeper, who made the entries, testified with respect thereto. See 3 Wigmore, *Evidence* §§ 750–55 (3d ed. 1940).

The basis for the court's preliminary explanation was apparently the holding that the instruction should not be given in the absence of a request therefor. *United States* v. *Woodmansee,* 354 F. 2d 235, 236 (C.A. 2). As the court of appeals observed, although the remark "would have been better left unsaid," the instruction which followed it was clear, and nothing prejudicial to petitioner could be inferred from it.

b. Petitioner requested the following instruction:

> Testimony with respect to the character and reputation of the defendant may raise a reasonable doubt where without it none would exist. [R. 129a.]

In lieu thereof the court instructed:

> Testimony has been given in this case concerning the good character of the defendant. If you believe that the defendant has established his previous good character, there [sic] you weigh the testimony of the witnesses to determine whether you do find that or not. If you do believe that he has established his previous good character, then you should give that fact due weight, and such evidence of good character when considered with all the other evidence may create a reasonable doubt. I said "may create a reasonable doubt." [R. 119a.]

It is true that evidence of good reputation has a tendency to engender reasonable doubt of guilt. That is the basis of its admissibility. However, such evidence should be considered together with all the other evidence adduced. *Michelson* v. *United States,* 335 U.S. 469, 476; *Edgington* v. *United States,* 164 U.S. 361, 366. The instruction offered was too broad and

the instruction given was proper. *United States* v. *Lowenthal*, 224 F. 2d 248, 249 (C.A. 2).

c. The court instructed that the indictment charged, in each of its three counts, that "defendant wilfully and knowingly received and accepted" various amounts of money from Novak (R. 112a). It also instructed:

> Now, of course, this being a criminal statute, the receipt and acceptance of money must be done knowingly and wilfully. If a man were in a drunken stupor and somebody stuck money in his pocket, you would not say that he received it knowingly and wilfully. [R. 114a.]

While distinctions are sometimes drawn between the words "knowingly" and "willfully," the applicable statute, 29 U.S.C. 186(d), uses only the term "willfully," so that any such distinctions were irrelevant. The jury could scarcely have been misled as to the nature of the offense charged or in any way confused by the illustration which the court offered. There was no exception to the instruction or request for further clarification.

d. On summation it was argued on behalf of petitioner (R. 100a, 101a): "The one that was really clipped here, as I see it, is Uncle Sam, the United States of America. * * * Now, this is a tax-deductible item, Mr. Novak. Did you take it off your income tax?" The court instructed without objection or exception:

> This is not an income tax case. Nobody is on trial in this case except Mr. Schabert. The

> Novak Company is not on trial in connection with income tax. * * * [R. 115a.]

The court then explained that the critical issue was whether petitioner knowingly and wilfully received money from the company which employed members of his labor organization. The court did not thereby take an issue of fact away from the jury; it merely directed the jury's attention from a false to the real issue in the case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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